APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 16, 2004

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-15023
D.C. No.
CV-00-01967-
MCE(PAN)

WATERKEEPERS NORTHERN CALIFORNIA, a non-profit corporation dba Deltakeeper; BILL JENNINGS,

Plaintiffs-Appellants,

v.

AG INDUSTRIAL MANUFACTURING INC.; CLAUDE E. BROWN,

Defendants-Appellees.

No. 03-15631
D.C. No.
CV-00-01967-
MCE(PAN)

WATERKEEPERS NORTHERN CALIFORNIA, a non-profit corporation dba Deltakeeper; BILL JENNINGS,

Plaintiffs-Appellees,

v.

AG INDUSTRIAL MANUFACTURING INC.; CLAUDE E. BROWN,

Defendants-Appellants.

Appendix A

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, District Judge, Presiding

Argued and Submitted
March 8, 2004—San Francisco, California

Filed July 16, 2004.

Before: B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI, Chief IT Judge.*

OPINION

BETTY B. FLETCHER, Circuit Judge.

Plaintiffs WaterKeepers Northern California and Bill Jennings (collectively, "WaterKeepers") appeal the district court's dismissal of their Clean Water Act suit for lack of jurisdiction. Defendants AG Industrial Manufacturing and Claude E. Brown (collectively, "AG Industrial") cross-appeal the district court's denial of their motion as prevailing parties for attorney's fees. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse the district court's dismissal in part, affirm in part, and affirm the district court's denial of attorney's fees.

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* The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

Appendix A

I.

WaterKeepers Northern California is a non-profit corporation dedicated to protecting wildlife and preserving natural resources in the San Francisco Bay and the Sacramento-San Joaquin Delta ("the Delta"). Bill Jennings is the director of DeltaKeeper, a WaterKeepers Northern California project focused specifically on the Delta. AG Industrial Manufacturing is a California company that produces farm machinery and equipment for the wine grape industry. The company was formed in 1980 and now employs approximately forty people at its Lodi facility. Claude E. Brown is the company's CEO and one of its two shareholders.

On June 28, 2000, WaterKeepers sent AG Industrial notice of its intent to sue for violations of the Clean Water Act ("the Act"). More than sixty days later, WaterKeepers filed this suit, alleging numerous continuing or recurring violations of the Act at AG Industrial's Lodi facility. The parties briefed the merits of WaterKeepers' claims in the district court, and each side submitted a motion for summary judgment. Without reaching the merits, however, the district court concluded that the suit had to be dismissed because WaterKeepers' intent-to sue letter provided insufficient notice of its claims. In a second order, the district court denied AG Industrial's motion for prevailing party attorney's fees. Although the district court found AG Industrial to be a prevailing party, it declined to award fees because it could not say that WaterKeepers' claims were "frivolous, unreasonable, or without foundation." *See Razore v. Tulalip Tribes,* 66 F.3d 236, 240 (9th Cir.1995) (adopting this standard for attorney's fees motions under the Clean Water Act).

Appendix A

We address the notice letter and attorney's fees issues in turn, but we begin with an explanation of the relevant statutory and regulatory background.

II.

Congress enacted the Clean Water Act in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251; *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 124 S.Ct. 1537, 1541 (2004). The Act prohibits the discharge of pollutants into United States waters except as authorized by the statute. 33 U.S.C. § 1311; *San Francisco BayKeeper, Inc. v. Tosco Corp.,* 309 F.3d 1153, 1156 (9th Cir.2002), *cert. dismissed,* 539 U.S. 924 (2003). The Act is administered largely through the National Pollution Discharge Elimination System ("NPDES") permit program. 33 U.S.C. § 1342. In 1987, the Act was amended to establish a framework for regulating storm water discharges through the NPDES system. Water Quality Act of 1987, Pub.L. 100- 4, § 405, 101 Stat. 7, 69 (1987) (codified at 33 U.S.C. § 1342(p)); *see also Envtl. Def. Ctr., Inc. v. EPA,* 344 F.3d 832, 840-41 (9th Cir.2003) (describing the problem of storm water runoff and summarizing the Clean Water Act's permitting scheme), *cert. denied,* 72 U.S.L.W. 3513 (U.S. June 7, 2004). The discharge of pollutants without an NPDES permit, or in violation of a permit, is illegal. *Ecological Rights Found. v. Pacific Lumber Co.,* 230 F.3d 1141, 1145 (9th Cir.2000).

Much of the responsibility for administering the NPDES permitting system has been delegated to the states. *See* 33 U.S.C. § 1342(b); *see also* Cal. Water Code § 13370

(expressing California's intent to implement its own NPDES permit program). States may issue individual permits to industrial dischargers or may cover many dischargers under the terms of one general permit. *See* 40 C.F.R. § 122.26(c); *Envtl. Def. Ctr.*, 344 F.3d at 853 (describing the general permit model). California has issued a general permit to cover industrial dischargers. State Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES General Permit No. CAS000001 (the "General Permit" or "Permit"); *Ecological Rights Found.*, 230 F.3d at 1145. In order to be covered under California's General Permit, individual dischargers must file a notice of intent with the state. General Permit at 1-2 ¶ 3.

The parties to this case agree that AG Industrial falls within an industrial classification under the Act and General Permit for which no specific pollutant effluent limitations have been set. Nonetheless, California's General Permit requires AG Industrial to identify and implement "best management practices" ("BMPs"),[1] *id.* at 4 ¶ B.3, and generally prohibits all non-storm water discharges, with a few exceptions for activities such as fire hydrant flushing

1. BMPs are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States." 40 C.F.R. § 122.2 (internal quotation marks omitted). "BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." *Id.* According to the General Permit, BMPs may be "structural" (*e.g.*, roofing, berms, treatment facilities) or "non-structural" (*e.g.*, good housekeeping, preventive maintenance, training). *See Natural Res. Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985, 991 n. 1 (9th Cir.2000).

and landscape watering. *Id.* at 3 ¶ A.1, 5 ¶ D.1. The Permit also requires dischargers to develop and implement an effective Storm Water Pollution Prevention Plan ("SWPPP"), *id.* at 11-23 ¶ A.1-A.10, and to develop and implement a comprehensive monitoring and reporting program. *Id.* at 24-35 ¶¶ B.1-B.15.

Private citizens may sue under the Clean Water Act to enforce the specific provisions of California's General Permit. 33 U.S.C. § 1365(a)(1), (f)(6); *Russian River Watershed Prot. Comm. v. City of Santa Rosa,* 142 F.3d 1136, 1139 (9th Cir.1998). In this case, WaterKeepers contends that AG Industrial has violated the Permit by discharging contaminated storm and non-storm water; by failing to develop and implement adequate BMPs; by failing to develop and implement an adequate SWPPP; and by failing to develop and implement an adequate monitoring and reporting program.

III.

The Clean Water Act requires citizen plaintiffs to notify alleged violators of their intent to sue at least sixty days before filing a complaint. 33 U.S.C. § 1365(b)(1)(A). In our circuit, compliance with this notice provision is required for jurisdiction. *See Natural Res. Def. Council v. Southwest Marine, Inc.,* 236 F.3d 985, 995 (9th Cir.2000); *cf. Hallstrom v. Tillamook County,* 493 U.S. 20, 31 (1989) (holding that notice is a mandatory prerequisite to suit under the Resource Conservation and Recovery Act but declining to decide whether the notice requirement "is jurisdictional in the strict

sense of the term"). In order to comply, a citizen plaintiff must send an intent-to-sue letter that includes

> sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, . . . [and] the date or dates of such violation.

40 C.F.R. § 135.3(a).

"The key language in the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself into compliance." *Cmty.Ass'n for Restoration of the Env't v. Henry Bosma Dairy,* 305 F.3d 943, 951 (9th Cir.2002) [hereinafter *Bosma Dairy*]. Notice is sufficient if it is reasonably specific and if it gives "the accused company the opportunity to correct the problem." *San Francisco BayKeeper,* 309 F.3d at 1158 (quoting *Atl. States Legal Found., Inc. v. Stroh Die Casting Co.,* 116 F.3d 814, 820 (7th Cir.1997)). Although the Act's notice requirement is "strictly construed," *Southwest Marine,* 236 F.3d at 998, plaintiffs are not required to "list every specific aspect or detail of every alleged violation." *Bosma Dairy,* 305 F.3d at 951 (quoting *Pub. Interest Research Group v. Hercules, Inc.,* 50 F.3d 1239, 1248 (3d Cir.1995)). We review the adequacy of pre-suit notice de novo. *San Francisco BayKeeper,* 309 F.3d at 1157.

Appendix A

A.

WaterKeepers sent AG Industrial a ten-page notice letter that is significantly longer and more detailed than the notice letter we held sufficient in *Southwest Marine.* 236 F.3d at 1003-08. WaterKeepers' letter describes the problem of storm water pollution in the Mokelumne River, which is a tributary to the San Joaquin River and the Delta. It specifically identifies pollutants associated with AG Industrial's operations; describes in detail the sources and practices that lead to the discharge of contaminated storm water from AG Industrial's site; and explains that non-storm water, contaminated by washing or hosing down dirty machinery or equipment, is flushed from AG Industrial's site into the storm sewer system. The letter faults AG Industrial for failing to seek coverage under California's General Permit, and accuses AG Industrial of violating the Act by discharging contaminated storm water "during at least every rain event over 0.1 inches." Two tables attached to the letter list daily rain accumulation at area sites. The letter also charges AG Industrial with violating the Act "on each and every date on which the facility discharged contaminated wash water." The letter suggests solutions for AG Industrial's storm and non-storm water discharge problems, including grading, berming, roofing, structural controls to prevent the discharge of contaminated water, and a filtration system to treat contaminated water.

With respect to prevention and monitoring requirements, WaterKeepers' letter states that AG Industrial has violated the General Permit by failing to develop and implement BMPs; by failing to implement an SWPPP; and by failing to

implement a monitoring and reporting program. The letter describes these Permit requirements in detail and directs the reader's attention to the specific Permit sections that explain what is required.

B.

The district court ruled WaterKeepers' notice letter inadequate solely on the basis of WaterKeepers' allegation regarding storm-water discharges. The district court held that WaterKeepers did not provide enough specific information about the dates of alleged storm-water discharges. Having carefully reviewed WaterKeepers' notice letter, we conclude that the district court's ruling on this point cannot be squared with our recent decision in *San Francisco BayKeeper.* San Francisco BayKeeper alleged in its notice letter that defendant Tosco Corp. illegally discharged petroleum coke "on each day when the wind [was] sufficiently strong to blow coke" from piles at Tosco's facility into a nearby waterway. *San Francisco BayKeeper,* 309 F.3d at 1159. We held this notice sufficient, even though San Francisco BayKeeper "did not provide any specific dates" for the alleged violations. *Id.* Here, WaterKeepers' notice letter states that AG Industrial discharges contaminated storm water during "every rain event over 0.1 inches." Because this allegation is as specific as San Francisco BayKeeper's, we hold that it is similarly sufficient.[2]

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2. The district court believed *San Francisco BayKeeper* to be distinguishable because the piles of petroleum coke were "so readily identifiable" as the pollution source in that case and because "the nature of potential remedial actions to be taken at the [AG Industrial] facility is by no means as clear." We do not agree that *San Francisco BayKeeper* can be distinguished in this way.

(Cont'd)

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The district court found it significant that WaterKeepers' expert, Steven Bond, testified at deposition that storm water will not always be discharged from AG Industrial's facility after a 0.1 inch rainfall; Bond stated that a 0.19 inch standard would be more accurate. This testimony may be relevant to the merits of WaterKeepers' claims, but we do not agree with the district court that it is relevant to the adequacy of WaterKeepers' notice letter. Regardless of whether WaterKeepers is able to prove each claimed discharge, its intent-to-sue letter put AG Industrial on notice as to the violations that WaterKeepers would allege in its complaint. The statute and regulation require no more. *See* 33 U.S.C. § 1365(b)(1)(A) (explaining that notice must be given of "alleged" violations); 40 C.F.R. § 135.3(a) (same). The district court found fault with the rainfall tables WaterKeepers attached to its notice letter. The court noted that the tables record rainfall at locations some distance from AG Industrial, that data is recorded as missing on many dates

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(Cont'd)

Although no single source may be blamed for all of AG Industrial's allegedly contaminated discharges, the company's pollution problem is as easy to understand as Tosco's: AG Industrial's site is allegedly littered with contaminants, and those contaminants are carried off the site when it rains. WaterKeepers' notice letter clearly identifies the sources of AG Industrial's problem-debris, manufacturing materials and activities exposed to rainfall, and oil, grease and chemical stains throughout the facility. The letter also describes remedial steps AG Industrial could take.

As was the case in *San Francisco BayKeeper,* WaterKeepers provided notice "sufficiently specific to inform [AG Industrial] about what it is doing wrong." 309 F.3d at 1159 (citation omitted).

in one table, and that in some cases the two tables list different rainfall amounts for the same dates. Again, however, these facts are relevant to the merits, not to the adequacy of WaterKeepers' notice letter. WaterKeepers was not required to include any rain tables under *San Francisco BayKeeper,* and, even if it had been, the tables it did send provide notice of several exact dates of alleged discharge violations.[3]

C.

AG Industrial offers four alternate grounds for affirming the district court's dismissal in whole or in part. First it argues that WaterKeepers' intent-to-sue letter provided insufficient notice of the storm water standards, limitations, or orders allegedly violated. *See* 40 C.F.R. § 135.3(a). California's General Permit prohibits storm water discharges that "cause or threaten to cause pollution, contamination, or nuisance," General Permit at 4 ¶ A.2; that "adversely impact human health or the environment," *id.* at 4¶ C.1; and that "contribute to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Water Board's Basin Plan." *Id.* at 4, ¶ C.2. WaterKeepers contends that AG Industrial has violated these provisions by discharging contaminated storm water that fails to meet Environmental Protection Agency ("EPA")

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3. We note that WaterKeepers submitted more complete rainfall data in support of its summary judgment motion, and that its supplemental data shows heavy rainfall on many of the same dates identified in WaterKeepers' original tables. WaterKeepers may pursue claims for the new dates included in its revised tables because the discharges alleged are all "from the same source" and "of the same nature." *Bosma Dairy,* 305 F.3d at 953.

water quality standards for California. *See* 40 C.F.R. § 131.38 (setting out quality standards for California waters, commonly known as the "California Toxics Rule"). AG Industrial argues that because WaterKeepers did not cite specifically to the California Toxics Rule in its notice letter, it cannot rely on the Rule to support its claims.

We are not persuaded. WaterKeepers' notice letter lists various contaminants believed to be at AG Industrial's site, explains how they are exposed to rainfall, and points to the specific provisions of the General Permit allegedly violated.[4] WaterKeepers' notice letter was thus "sufficiently specific to inform [AG Industrial] about what it is doing wrong."[5] *San Francisco BayKeeper,* 309 F.3d at 1159 (quoting *Southwest Marine,* 236 F.3d at 996).

AG Industrial next challenges the sufficiency of WaterKeepers' notice regarding non-storm water discharges.

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4. The General Permit is an "order" of the State Water Resources Control Board. *See* 40 C.F.R. § 135.3(a) (requiring notice that includes information sufficiently specific to allow the recipient to identify the "standard, limitation, or *order* " allegedly violated) (emphasis added).

5. For similar reasons, we reject AG Industrial's challenge to WaterKeepers' reliance on EPA benchmark values. *See* Proposed Reissuance of NPDES Storm Water Multi-Sector General Permit for Industrial Activities, 65 Fed.Reg. 171010, 17031 (proposed March 30, 2000) (setting out EPA benchmark values for certain contaminants). WaterKeepers points to the EPA benchmark values as evidence to support its claim that AG Industrial has failed to implement adequate BMPs. WaterKeepers satisfied the Act's notice requirement for this claim by specifically referring to the General Permit's BMP provisions in its notice letter.

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WaterKeepers' intent-to-sue letter accuses AG Industrial of discharging contaminated non-storm water whenever it periodically washes down dirty areas of the facility or dirty machinery and equipment. "At these times," according to the letter, "contaminants present in the area are carried off by the wash water and flushed into the storm sewer system." WaterKeepers' letter alleges violations of the Act "on each and every date on which [AG Industrial's] facility has discharged contaminated wash water."

We follow *San Francisco BayKeeper* in holding that these allegations are sufficient to satisfy the Act's notice requirement. *See San Francisco BayKeeper,* 309 F.3d at 1158-59. In addition to the wind-related discharges discussed above, San Francisco BayKeeper notified defendant Tosco that it was responsible for illegal petroleum coke spills on each day of ship loading at Tosco's facility. *Id.* at 1158. We held this notice sufficient because San Francisco BayKeeper was only required to "provide sufficient information *to permit the recipients* to identify . . . the date or dates" of alleged violations and because BayKeeper's allegations were specific enough for this purpose. *Id.* at 1158-59 (omission and emphasis in the original; internal quotation marks and citation omitted). As a practical matter, BayKeeper did not have access to Tosco's complete records, and Tosco was "obviously in a better position than BayKeeper" to identify the dates of its own ship loading. *Id.* at 1158. The same is true here. AG Industrial is in a much better position to know when it periodically washes down areas of its facility, and WaterKeepers' letter provided sufficient information to permit AG Industrial to identify the nature and dates of the

alleged violations. The point of the Act's notice requirement is not to *prove* violations, it is to inform the polluter "about what it is doing wrong," and to allow it an "opportunity to correct the problem." *Id.* at 1159. (quoting *Southwest Marine,* 236 F.3d at 996, and *Atl. States Legal Found., Inc.,* 116 F.3d at 819); *see also Bosma Dairy,* 305 F.3d at 953 (explaining that Congress did not intend, in enacting the notice requirement,"to unduly burden citizens by requiring them to basically carry out the job of the [environmental enforcement] agenc[ies]"). WaterKeepers' notice letter plainly satisfies these criteria.[6]

AG Industrial argues that the district court's dismissal may be affirmed with respect to WaterKeepers' prevention, monitoring and reporting claims because AG Industrial has now cured all alleged violations. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 57-64 (1987) (holding that citizen plaintiffs may not sue for "wholly past" violations of the Clean Water Act but must instead allege "continuous or intermittent" violations). AG Industrial contends that it has now filed a notice of intent to comply

6. We note one exception to our general holding regarding non-storm water discharges. WaterKeepers' complaint and summary judgment motion refer to manufacturing "process water" or "wastewater" that is discharged from AG Industrial's facility. Because WaterKeepers' notice letter does not refer to manufacturing process water or wastewater, we affirm dismissal with respect to this claim. We doubt that this holding will have a significant effect on proceedings below, however, because at oral argument plaintiffs' counsel indicated that WaterKeepers intends to proceed only with those non-storm water claims specifically referred to in the notice letter—that is, non-storm water claims based on facility and equipment washing.

with the General Permit and that it prepared an SWPPP and a monitoring plan in July 2000, after receiving WaterKeepers' notice letter but before WaterKeepers filed its complaint. WaterKeepers responds that AG Industrial's new management practices and prevention, monitoring and reporting plans are inadequate, ineffective and fail to meet the requirements of the General Permit.

We considered a similar situation and rejected an argument nearly identical to AG Industrial's in *Southwest Marine:*

> If a defendant receives a proper notice letter alleging that it has failed to prepare and implement an adequate plan and, in response, prepares a new plan and begins to implement it before the complaint is filed, is the otherwise proper notice letter defective for failing to identify and discuss the new plan and its implementation? In those circumstances, must a citizen-plaintiff send a new notice letter? We think not. Subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant.

236 F.3d at 997 (considering "what, if any, effect Defendant's post-notice alterations of its plans and facilities had on the adequacy of the [plaintiffs'] notice letter"). Following *Southwest Marine,* we hold that WaterKeepers was not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of AG Industrial's post-notice compliance efforts. *Id.* ("Although we require

strict compliance with the [Act]'s notice requirement, we do not require citizen-plaintiffs to refer to provisions of plans that do not exist.").

Finally, AG Industrial relies on the Supreme Court's decision in *Gwaltney* to argue that we may affirm dismissal because the evidence the parties submitted on summary judgment proves that WaterKeepers did not file its complaint in "good faith." *See Gwaltney,* 484 U.S. at 64 ("[W]e agree that § 505 [of the Act] confers jurisdiction over citizen suits when the citizen-plaintiffs make a *good-faith* allegation of continuous or intermittent violation . . . .") (emphasis added). In essence, AG Industrial argues that we should look ahead to the parties' summary judgment evidence, hold that AG Industrial wins on the merits, further hold that AG Industrial's evidence is so strong that it proves WaterKeepers' complaint was not filed in good faith, and affirm dismissal because the Act only confers jurisdiction over good-faith allegations. We conclude that this argument rests on a misunderstanding of *Gwaltney.*

Gwaltney held that citizen plaintiffs may not sue to remedy "wholly past" violations of the Clean Water Act; the Act confers jurisdiction only over citizen suits that allege continuous or intermittent violations.[7] *Id.* at 56-63. *Gwaltney* did not hold, contrary to AG Industrial's suggestion, that citizen plaintiffs must prove a violation of the Act before jurisdiction attaches or that dismissal for lack of jurisdiction is the proper remedy for allegations that turn out not to have

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7. WaterKeepers' suit plainly passes this test—WaterKeepers' complaint alleges continuing and recurring violations of the Act.

been made in good faith. Instead, the Supreme Court explained that an *allegation* is sufficient to confer jurisdiction and that Fed.R.Civ.P. 11 provides the proper remedy for bad-faith claims. *See id.* at 64 ("Petitioner argues that citizen-plaintiffs must prove their allegations of ongoing noncompliance before jurisdiction attaches under [the Act]. We cannot agree.") (citation omitted); *id.* at 65 ("The statute does not require that a defendant 'be in violation' of the Act at the commencement of suit; rather, the statute requires that a defendant be '*alleged* to be in violation.'"); *id.* ("Our acknowledgment that Congress intended a good-faith allegation to suffice for jurisdictional purposes . . . does not give litigants license to flood the courts with suits premised on baseless allegations. *Rule 11 of the Federal Rules of Civil Procedure* . . . adequately protects defendants from frivolous allegations.") (emphasis added). Adopting AG Industrial's proposed approach at this stage would ignore these teachings. Accordingly, we hold that *Gwaltney* does not require us to reach the merits of the parties' summary judgment motions in order to decide whether the district court has jurisdiction.

D.

Because it is clear under Supreme Court and Ninth Circuit precedent that the district court has jurisdiction over nearly all of WaterKeepers' claims, we cannot say that AG Industrial is a prevailing party entitled to attorney's fees under the Act. *See Razore,* 66 F.3d at 240 (explaining that a defendant is entitled to attorney's fees only if the plaintiff's claims were "frivolous, unreasonable, or without foundation").

IV.

The district court must ultimately decide whether WaterKeepers' evidence of continuous and ongoing violations is sufficient to survive summary judgment. On this appeal we hold only that the district court has jurisdiction to reach the merits of all but WaterKeepers' industrial process water claim. Accordingly, we reverse the district court's dismissal in part, affirm as to WaterKeepers' process water claim, affirm the district court's denial of attorney's fees, and remand so that the district court may reach the merits. We decline WaterKeepers' invitation to sanction AG Industrial under either Fed. R.App. P. 38 or 28 U.S.C. § 1927.Appellants are entitled to their costs.

REVERSED IN PART; AFFIRMED IN PART; AND REMANDED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA FILED DECEMBER 3, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

N0. CIV. S 00-1967 MCE PAN

WATERKEEPERS NORTHERN CALIFORNIA, a non-profit corporation, doing business as DELTAKEEPER, and BILL JENNINGS, an individual;

Plaintiffs,

v.

AG INDUSTRIAL MANUFACTURING, INC., a corporation; and CLAUDE E. BROWN, an individual;

Defendants.

MEMORANDUM AND ORDER

This is an action for violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., hereinafter referred to as the "Clean Water Act." Plaintiffs allege that Defendants AG Industrial Manufacturing, Inc. and its president, Claude E. Brown, have repeatedly discharged industrial pollution into the Mokelumne River and the San Joaquin River Delta ever since Defendants became subject to the provisions of the Clean Water Act in 1992. Plaintiffs now move for summary judgment, or alternatively for

summary adjudication of claims, on grounds that, the evidence demonstrates as a matter of law Defendants' continuing failure to comply with the requirements of the Clean Water Act. Defendants, in turn, have filed their own cross-motion for summary judgment or summary adjudication on several grounds, including the failure, by Plaintiffs, to provide adequate notice of their intent to sue as required by the Clean Water Act at 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.3(a). As set forth below, the Court finds that the notice provided to Defendants was inadequate and that it accordingly lacks jurisdiction to hear this matter. Summary judgment in favor of Defendants is therefore granted.[1]

BACKGROUND

Defendant AG Industrial Manufacturing, Inc. (hereinafter "AIM") is an industrial manufacturing facility engaged in the fabrication of agriculture machinery, especially equipment used in harvesting wine grapes. The business has been located at 110 S. Beckman Rd. in Lodi, California, since its inception in 1980. Defendant Claude E. Brown is President of AIM. He has served in that capacity since the company was formed.

Plaintiff WaterKeepers Northern California (hereinafter "WaterKeepers") is a non-profit corporation dedicated to the preservation and protection of the San Francisco Bay and the Delta estuary. WaterKeepers alleges its investigation of the AIMS premises revealed fabrication activities generating

1. Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefing. E.D. Cal. Local Rule 78-230(h).

industrial pollutants that occurred outside in uncovered areas exposed to rainfall. WaterKeepers further contends that the facility contains rusting equipment and parts also exposed to the weather, as well as the presence of oily stains, waste materials and debris. Because of exposure to storm water flows and lack of essential structural controls like grading, berming and roofing, WaterKeepers contends that both storm water flows and wash water from clean-up activities contain industrial contaminants.

WaterKeepers conducted an on-site inspection of AIM's facility on August 8, 1999 when photographs were taken. The only other visit to AIM on behalf of WaterKeepers was a subsequent inspection so brief that WaterKeepers' expert, Steven Bond, did not even exit his vehicle. Prior to notifying AIM of its intent to sue, WaterKeepers conducted no testing of water discharged from the AIM facility and further performed no tests on dust or particulate matter allegedly observed by WaterKeepers on the premises. Nonetheless, by letter dated June 28, 2000, WaterKeepers advised AIM that it would commence judicial proceedings against AIM once 60 days had passed. In that letter, WaterKeepers charged AIM with violating the Clean Water Act "each time that you have discharged storm water or wash water contaminated with pollutants."

No specific dates for these alleged violations are set forth in the June 28, 2000 letter. With respect to the contaminated wash water, WaterKeepers makes no attempt whatsoever to list any dates of infraction. As to its charges that AIM discharged polluted storm water, WaterKeepers again provides no dates, stating only that such discharges have

occurred during "at least every rain event over 0.1 inches." To substantiate that claim, WaterKeepers attaches two tables of rain data that it claims are for the Lodi region. One of those tables charts rainfall in Stockton, a city some fifteen miles away from Lodi. The remaining chart measures rainfall at Bear Creek "near" Lodi, and Defendants' notice contains no information concerning how close that is to the AIM facility. In addition, the last recorded data contained in the Bear Creek chart dates from June 4, 1997, some three years before issuance of WaterKeepers' letter. Even prior to that time, the Bear Creek rainfall data was frequently incomplete, with many dates listed as missing any precipitation information whatsoever. Further, comparison of the two charts for recording period that do overlap show sometimes significant differences in precipitation levels on given days,[2] making their applicability to yet another geographic location like the AIM facility even more problematic.

Even aside from the dates purportedly reflected on the precipitation tables, WaterKeepers' June 28, 2000 notice contains the additional sweeping statement that, "whether or not such dates are contained on the rainfall data table," AIM "committed violations of the Act on each and every date on which the rainfall at the Facility exceeded 0.1 inch . . ." Significantly, WaterKeepers' own expert, Steven Bond, admitted at deposition that the premise underlying the 0.1 inch benchmark was incorrect, later stating that 0.19 inches

2. On January 1 and 2, 1997, for example, the Stockton data shows only .80 and .30 inches of rain, respectively, and during the same period the Bear Creek levels are 1.26 and .94 inches.

was more accurate in predicting the likelihood of any contaminated storm runoff.[3]

Prior to receiving WaterKeepers' letter of June 28, 2000, AIM management were unaware of either the requirements of the Clean Water Act or its potential applicability to the AIM facility. Nonetheless, in an effort to avoid threatened litigation, Brown located an environmental engineer, Daniel K. Barber, and proceeded to hire Mr. Brown for purposes of ensuring compliance with the Clean Water Act. Within approximately ten days following receipt of Waterkeeper's letter, AIM submitted a Notice of Intent certification to the State of California signifying its intent to comply with the Clean Water Act. Thereafter, on or about July 21, 2000, a Storm Water Pollution Prevention Plan was submitted, with a copy sent to WaterKeepers. WaterKeepers nonetheless proceeded to file the instant litigation on September 12, 2000.

STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Under summary judgment practice, the moving party

> "always bears the initial responsibility of informing the district court of the basis for its

3. Bond Deposition, Exhibit "B" to the Second Supplemental Declaration of Dennis M. Hauser, 21:19-22:17; see also Declaration of Steven Bond dated May 23, 2002, ¶ 12.

> motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact."

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Rule 56(c)).

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-587 (1986); *First Nat'l Bank v. Cities Ser. Co.*, 391 U.S. 253, 288-289 (1968).

In attempting to establish the existence of this factual dispute, the opposing party must tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P. 56(e). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251-52 (1986); *Owens v Local No. 169 Assoc. of Western Pulp and Paper Workers*, 971 F.2d 347, 355 (9th Cir. 1987). Stated another way, "before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the

party producing it, upon whom the onus of proof is imposed." *Anderson*, 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872)). As the Supreme Court explained, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more that simply show that there is some metaphysical doubt as to the material facts . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586-87.

In resolving a summary judgment motion, the evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed, before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987).

ANALYSIS

The purpose of the Clean Water Act, adopted in 1972, is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Section 402(p) of the Act establishes a framework for regulating industrial storm water discharges under the National Pollution Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342(p). States with approved NPDES permit programs are authorized by Section 402 (p) to regulate

industrial storm water discharges through either individual permits or by issuance of a single, statewide general permit applicable to all industrial dischargers. *Id.* In November 1991, the California State Water Resources Control Board issued Water Quality Order No. 91-13-DWQ, which created a statewide general permit program. An industrial facility must either comply with the terms of this Order, as subsequently amended, or obtain an individual NPDES permit before discharging storm water. 33 U.S.C. § 1342.

The Clean Water Act does permit commencement of a citizen suit to enforce its provisions. Section 505(a) of the Act, 33 U.S.C. § 1365(a), provides in pertinent part as follows:

> ". . . any citizen may commence a civil action on his own behalf –
>
> (1) against any person . . . alleged to be in violation of (A) an effluent standard of limitation under this chapter or (B) an order issued by . . . a State with respect to such a standard or limitation."

Before instituting such an action, however, the Act requires a minimum of 60 days written notice of "any standard, limitation or order" violated. 33 U.S.C. § 1365(b)(1)(A). By regulation, the content of this Notice has certain requirements:

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with

> respect thereto, shall include sufficient information to permit the recipient, to identify the specific standard, limitation or order alleged to have constituted a violation, the person or persons responsible for the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3(a).

In *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), the Supreme Court interpreted a provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972. ("RCRA"), containing a 60 day notice prerequisite similar to that required before commencement of a citizen suit under the Clean Water Act. The Court found that failure to meet the notice requirement required a district court to dismiss a citizen suit as barred by the terms of the statute, stating as follows:

> "[W]e hold that the notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision; a district court may not disregard these requirements at its discretion."

Id. at 31.

Appendix B

The Court expressly rejected the suggestion that it apply a "flexible or pragmatic construction" to the citizen suit notice provision:

> The equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' 'failure to take the minimal steps necessary' to preserve their claims." (citation omitted)

Id. at 27-28.

In *Washington Trout v. McCain Foods*, 45 F.3d 1351, 1352 (9th Cir. 1995), the Ninth Circuit found the logic of Hallstrom to be equally applicable to the notice provision at issue here pursuant to 33 U.S.C. § 1365(b)(1). Consequently, as an initial matter this Court must determine whether the 60-day notice issued by WaterKeepers in this case is jurisdictionally sufficient to permit maintenance of this action in federal court. Defendants contend, inter alia, that the notice is defective because it fails to accurately the state the dates of the alleged discharges in accordance with the terms of the statute and corresponding regulation.

In *California Sportfishing Protection Alliance v. City of West Sacramento*, 905 F.Supp. 792 (E.D. Cal. 1995), the Eastern District considered the sufficiency of plaintiff's Clean Water Act pre-litigation notice in the context of a motion to dismiss brought by the defense. California Sportfishing's 60-day notice advised the City of three specific violations of its NPDES permit occurring on specified dates, and went on to claim that the City had violated said permit "[f]or the

previous five years on hundreds of occasions." Citing the decision in *Washington Trout*, *supra*, the court recognized the strict approach to the notice provision adopted by the Ninth Circuit as most consistent with the purpose and structure of the notice statute and the language of the corresponding regulation. Significantly for purposes of the present matter, the California Sportfishing decision offers the following observation with regard to the specificity required in identifying the date or dates of alleged violations:

> "[T]he date or dates of the violation must be stated with some specificity. Ideally plaintiff will identify the precise date. But at the least plaintiff should give a range as to date that is reasonably limited."

Id. at 799.

Although the Eastern District ultimately found that the notice provided in *California Sportfishing* complied with statutory requirements, it did so because of the three date-specific violations that were alleged. The court did not find sufficient, however, plaintiff's sweeping conclusion that the City had also violated the Clean Water Act on hundreds of occasions over the previous five years, stating that such generalizations do "not give sufficient notice of the date or dates on which the violations are alleged to have occurred." *Id.* at 800.

Unlike *California Sportfishing*, there are no specific violation dates cited in WaterKeepers' notice. WaterKeepers' claim that Defendants violated the Act "each time" they discharged contaminated wash water over the previous eight

year period is just as vague as the language rejected by Judge Levi as insufficient in *California Sportfishing*. Nor does WaterKeepers' reference to incomplete and geographically distinguishable rainfall data make its notice adequate with regard to storm water discharge. Given the Ninth Circuit's strict approach to notice requirements, such references do not give "a range as to date that is reasonably limited" as required by California Sportfishing. Waterkeepers' notice must therefore be found lacking.

More recent Ninth Circuit authority is in accord with this conclusion. In *Friends of Frederick Seig Grove v. Sonoma County Water Agency*, 124 F.Supp.2d 1161 (9th Cir. 2000), the defendants had been subject to four previous enforcement orders involving effluent violations of their NPDES permit during the four month period that preceded plaintiff's notice of intent to file suit under the Clean Water Act. In addition, while plaintiff's notice advised defendants that they had committed violations "on numerous separate occasions from January 1, 1995 to the date of [the] notice," the notice went on to state that these violations were based on review of defendants' own monitoring data submitted by defendants to the Regional Board. While the notice did list 326 separate violations, it failed to specifically identify the dates on which any of the alleged violations occurred.

Citing approvingly the Eastern District's decision in *California Sportfishing*, *supra*, the Ninth Circuit in *Seig Grove* noted that plaintiff could not "simply allege that violations occurred within a broad period of time with no additional information." *Id.* at 1168. While noting that it was a "close call," the court nonetheless found plaintiff's notice

to be sufficient because the violations it identified were based on the defendants' own submissions, in the form of self-monitoring data, to the Regional Board.

In this case we are faced with nothing more that WaterKeeper's bald assertion that violations occurred "each time" wash water was discharged and "on each and every date" that two rainfall data tables (both of which are not site-specific to the AIM facility, with one table being substantially incomplete as well) suggest that precipitation in excess of .10 inch was present. If the circumstances present in *Seig* Grove were a "close call" with respect to the sufficiency of notice, the situation confronted here certainly is not.

Community Assn for Restoration of the Environment v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002), like *Seig Grove*, involved a long history of compliance problems on the part of the defendant. Plaintiff's pre-suit notice of Clean Water Act violations referred to twelve specific violations, enumerated by date and all involving a single drain for discharge of manure waste. Because plaintiff's complaint listed some thirty two additional violations (also involving the same drain in question) that had not been delineated by the notice, defendant argued that plaintiff's notice was insufficient as to those additional violations. Although the *Bosma* court continued to recognize that notice should give a range as to date that is reasonably limited, it nonetheless found that the notice here was sufficiently specific to inform plaintiff as to its purported shortcomings because the violations alleged "originated from the same source, were of the same nature, and were easily identifiable." Here we are

not dealing with infractions originating from a single drain but instead are confronted with a myriad of allegations pertaining both to systemic (pollutants generated by AIM's manufacturing activities themselves), maintenance (the condition of the AIM facility) and structural (berming to direct water flow, for example) issues. In short, the present matter does not involve the same readily ascertainable source of pollution confronted in Bosma,[4] and the rationale for relaxing specific date requirements in light thereof is accordingly not present.

Finally, the Ninth Circuit's even more recent decision in *San Francisco BayKeeper v. Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002) is of no assistance to DeltaKeeper in validating its pre-suit notice. In that case, the defendant owned and operated a petroleum coke storage and loading facility adjacent to the New York Slough, a navigable waterway flowing into the San Francisco Bay. Plaintiff's notice in Tosco alleged that loose coke, stored in large uncovered piles, both spilled during ship loading and was blown by the wind into New York Slough, thereby polluting the water. Plaintiff's notice identified fourteen dates in 1998 when Coast Guard records showed that ships had been docked at defendant's facility. The court, finding that defendant was in a better position than BayKeeper in identifying the precise

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4. According to Defendants, efforts to identify the source of certain pollutants are ongoing. They claim that certain metals detected through testing are not in fact produced by AIM's industrial activities, arguing, for example, that zinc discharges may be generated not by anything pertaining to AIM's manufacturing operations but instead by rainwater dripping from a corrugated chain link fence surrounding the facility.

dates of its own ship loading, held that notice was sufficient as to the alleged loading violations. Here no similar argument can be made that AIM had ready access to information that WaterKeepers did not.

While the Tosco court does state that plaintiff's claim of wind discharge[5] presents a "closer question" in terms of the adequacy of notice, the court nonetheless found that because the uncovered coke piles were so clearly identified as the offending practice, plaintiff's notice was "sufficiently specific" to inform defendant of what it was doing wrong and "specific enough" to give Tosco an opportunity to correct the problem by enclosing or covering the coke piles. *Id.* at 1159.

The case at bar is distinguishable from *Tosco* in this respect in just the same way it differs from *Bosma*. In both Tosco and Bosma the fact that the violation source was so readily identifiable justified some departure from the requirement that specific dates be included within the notice so as to ensure that the defendants understood the allegations levied against them.

Here there is no justification for any such departure because the nature of potential remedial actions to be taken at the AIM facility is by no means as clear.

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5. The notice alleged that wind-blown violations took place "on each day when the wind has been sufficiently strong to blow coke from the piles into the slough." *Id.* at 1158.

Appendix B

CONCLUSION

Based on the foregoing, the Court finds insufficient the 60-day notice required by 33 U.S.C. § 1365 (b) (1) (A) and 40 C.F.R. § 135.3 (a) as a prerequisite to Plaintiff's commencement of the instant litigation. That insufficiency mandates dismissal of this action, and Defendants' motion for summary judgment is accordingly granted. Because the case is consequently disposed of on jurisdictional grounds, the Court need not address the remaining allegations made by Defendants in their motion, or the merits of Plaintiff's motion for summary judgment/summary adjudication of issues. In addition, because the parties' extensive evidentiary objections, as well as Plaintiff's Motion to Strike the Declaration of Daniel K. Barber, raise issues not necessary to the Court's ruling, no ruling is made on those matters either.

IT IS SO ORDERED.

DATED: DEC 3 2002

s/ Morrison C. England
MORRISON C. ENGLAND, Jr.
UNITED STATES DISTRICT JUDGE